Terraprise Holdings, Inc. d/b/a Global Recruiters of Winfield *and* Matthew Schmidt, an Individual.
Case 13–CA–108187

December 16, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On February 26, 2014, Administrative Law Judge Geoffrey Carter issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C., December 16, 2015

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HIROZAWA, concurring in part and dissenting in part:

I join my colleagues in adopting the judge's findings that the Respondent, Global Recruiters of Winfield, did not violate Section 8(a)(1) by changing or limiting Charging Party Matthew Schmidt's work assignments and opportunities, or by directing an employee not to discuss his work assignments with Schmidt. Contrary to my colleagues, however, I would find that the Respondent violated Section 8(a)(1) by discharging Schmidt. In my view, the Respondent terminated Schmidt in retaliation for his protected concerted activity, namely providing an affidavit and testimony in support of a former coworker's unemployment benefits appeal.

The Respondent did not except to the judge's finding, nor do my colleagues dispute, that the General Counsel met his initial *Wright Line* burden of proving that Schmidt's protected concerted activity was a motivating

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We adopt the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by changing and limiting Charging Party Matthew Schmidt's work assignments and opportunities in retaliation for his protected concerted activity. The General Counsel alleged four specific changes. The judge correctly found that two of the alleged changes—that Michael Agnew, the Respondent's owner and president, gave new nuclear department employees more lucrative assignments and hid job orders from Schmidt—did not occur. The judge's findings, supported by the record, establish that a third alleged change—that Agnew precluded Schmidt from direct contact with most of the Respondent's nuclear clients—also did not occur. As to the fourth alleged change—that Agnew added new employees to the nuclear department—we agree with the judge that the Respondent met its burden of establishing that it would have made the change even absent Schmidt's protected activity. Although the Respondent did not add employees to the nuclear department until after Schmidt's protected activity, the additions were contemplated and initiated prior to his protected activity.

In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by discharging Schmidt for engaging in protected concerted activity, we note that the Respondent did not except to the judge's finding that the General Counsel met his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Member McFerran nevertheless finds, contrary to the judge, that Agnew's remarks to Schmidt on December 19, 2012, February 11, 2013, and April 17, 2013 about Schmidt's participation in a former employee's unemployment hearing constitute additional evidence of animus towards Schmidt's protected concerted activity. In the absence of a related exception, Member Miscimarra finds it unnecessary to decide whether Agnew's remarks evidenced animus towards Schmidt's protected conduct.

In agreement with the judge, however, we find that the Respondent established that it would have discharged Schmidt even absent his protected concerted activity. As the Board has explained, a respondent employer "is required to establish its *Wright Line* defense only by a preponderance of the evidence" and its "defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it." *Merillat Industries*, 307 NLRB 1301, 1303 (1992). Here, the preponderance of the evidence indicates that Schmidt would have been discharged in any event because of his performance and attendance issues. Our dissenting colleague views the evidence differently, and reasonable minds might differ on what the evidence shows. We nevertheless agree with the judge that, under the applicable evidentiary standard, the Respondent met its rebuttal burden.

We note that *Hoodview Vending Co.*, 359 NLRB No. 36 (2012), cited by the judge, was affirmed by a properly constituted three-member panel in 362 NLRB No. 81 (2015) (Member Miscimarra, dissenting). In addition, we do not rely on *Station Casinos, LLC*, 358 NLRB No. 153 (2012), cited by the judge. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). Instead, we rely on *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000).

factor in the discharge.[1] I part company, however, with my colleagues' finding that the Respondent proved that it would have fired Schmidt for his performance and attendance issues even absent his protected concerted activity. Rather, the evidence demonstrates that Schmidt's discharge was driven by the belief of Michael Agnew, the Respondent's founder, owner, and president, that Schmidt's protected activity demonstrated disloyalty to Agnew and the company.

The facts are largely undisputed. Schmidt was hired in April 2011 and promoted in April 2012. By all accounts, he was an excellent performer through September 2012, and the Respondent awarded him a $4000 bonus in early September. At the time, he was getting a ride to work from John Lucas, who was both his roommate and a fellow employee. But the Respondent discharged Lucas in late September, after which Agnew grew increasingly concerned that Lucas would form a rival firm and that Schmidt might join him. Meanwhile, after his discharge, Lucas filed a claim for unemployment benefits, which the Respondent disputed. The state unemployment agency initially determined that Lucas was ineligible for unemployment benefits. Lucas appealed, and he asked Schmidt and Samantha Chellberg, another employee, to provide affidavits on his behalf.

Agnew became aware of Schmidt's protected activity on December 18, 2012, when he received copies of Schmidt's and Chellberg's affidavits.[2] Agnew was furious upon receiving the affidavits. Talking to Schmidt later that day, he stated, "[W]e can let this pull us apart; we can grow from this; or we can part ways." Agnew thereafter attempted to win Schmidt over by informing him that he had earned a "peak performer's trip" to the Bahamas. Agnew's effort failed, however, at least from Agnew's perspective: at Lucas's request, Schmidt testified at Lucas's unemployment appeal hearing, which took place on January 29, 2013. At the hearing, Schmidt testified, among other things, that he believed that Agnew had given him the $4000 bonus in September because Agnew was intending to get rid of Lucas and Agnew knew that Schmidt would need a car to get to work.

On January 31, the state administrative law judge who heard Lucas's case ruled that the Respondent had terminated Lucas for reasons other than misconduct, as it had claimed, and the judge reversed the earlier denial of Lucas's unemployment benefits. Soon after, on February 11, Schmidt told Agnew that he felt the Respondent was punishing him by giving him lower-level job orders because of his protected activity; Agnew aggressively responded by asking Schmidt to think about how he (Agnew) felt when Schmidt "used the bonus against [him] at the hearing." At that point, Schmidt's future with the Respondent was essentially over. Indeed, when Agnew fired Schmidt two months later, in April, he told him that he did not think they could "get past what had happened."

The foregoing sequence of events undermines the Respondent's claim that it would have fired Schmidt, absent his participation in Lucas's case, because of his alleged performance and attendance issues. Rather, the record shows that the Respondent's reasons were pretextual. Although Schmidt's performance had suffered in the last quarter of 2012, the Respondent took no action against him at that time. And in 2013, in the months leading up to the discharge, Schmidt's performance dramatically improved. He made twice as many submittals (identifying job candidates for placement with one of the Respondent's clients) in early 2013 as in late 2012. Yet it was in March 2013 that Agnew chose to place him on a performance improvement plan (PIP) and then discharge him in April, allegedly for poor performance and attendance issues.[3]

Nor does the record support the Respondent's claim that it fired Schmidt in part because of tardiness and attendance problems. A year prior to his discharge, Agnew had advised Schmidt that he could work late to make up for a late arrival, or have leave that exceeded his vacation time deducted from his paycheck and returned to him at the end of the year in the form of a bonus. Although Schmidt was occasionally tardy, the Respondent failed to offer any evidence that Schmidt ever departed from the arrangement that Agnew offered or that he ever worked less than a full day. As for his absences, the Respondent failed to demonstrate that they were unapproved, or that Schmidt was ever told prior to his protected activity that his attendance was an issue. An em-

[1] *Wright Line*, 251 NLRB 1083 (1980) (subsequent history omitted). The judge found that the General Counsel demonstrated animus by presenting evidence that Agnew gave shifting rationales for why he removed Schmidt's remote access privileges and by the suspicious timing of Schmidt's discharge. I join Member McFerran in finding that Agnew's repeated statements to Schmidt about his participation in former employee John Lucas's unemployment appeal constitute additional evidence of animus that the judge did not take into account.

[2] It is uncontested that Schmidt was engaged in protected concerted activity when he and Chellberg submitted affidavits and testified on behalf of Lucas in his unemployment benefits case against the Respondent. See *Supreme Optical Co.*, 235 NLRB 1432, 1432–1433 (1978), enfd. 628 F.2d 1262 (6th Cir. 1980), cert. denied 451 U.S. 937 (1981) (employees were engaged in protected concerted activity when they attended a former coworker's unemployment hearing).

[3] In placing Schmidt on a PIP, the Respondent failed to follow its handbook, which requires that PIPs be provided in writing. An employer's failure to follow its own procedures in disciplining or discharging an employee undercuts its attempt to meet its rebuttal burden. See *Allstate Power Vac., Inc.*, 357 NLRB No. 33, slip op. at 4 (2011).

ployer fails to meet its rebuttal burden when the evidence shows that it tolerated an employee's shortcomings until the employee engaged in protected activity. See, e.g., *Diversified Bank Installations*, 324 NLRB 457, 476 (1997). Moreover, in this case, the record establishes that the Respondent did not similarly discipline other employees for attendance and tardiness. One employee who had comparable attendance and tardiness issues was permitted, as Schmidt was the year before, to start his workday at a later time.

Finally, the Respondent's belated assertion of "attitude" as a reason for Schmidt's discharge further supports the conclusion that the Respondent's claims are pretextual. The Respondent raised Schmidt's "attitude" for the first time at the unfair labor practice hearing.[4] The Board has often found that when an employer offers shifting reasons for its actions, especially vague and unrebuttable claims like "negativity" or attitude, an inference may be drawn that the reasons being offered are pretexts designed to mask an unlawful motive. See, e.g., *Zurn Industries, Inc.*, 255 NLRB 632, 635 (1981), affd. 680 F.2d 683 (9th Cir. 1982), cert. denied 459 U.S. 1198 (1983). In this case, however, it is not difficult to discern that "attitude" was shorthand for Schmidt's willingness to testify on behalf of Lucas and against the Respondent, which Agnew repeatedly complained about to Schmidt. See *Children's Studio School Public Charter School*, 343 NLRB 801, 805 (2004) (citing *Climatrol, Inc.*, 329 NLRB 946 fn. 4 (1999); *Webco Industries*, 334 NLRB 608, 622 (2001); *Promenade Garage Corp.*, 314 NLRB 172, 179–180 (1994)).

In sum, Agnew equated Schmidt's protected concerted activity with disloyalty to Agnew and the company. But a belief that solidarity with fellow workers is incompatible with an employee's duty of loyalty to his employer violates a fundamental premise of the Act, and that belief was, at bottom, the basis for Schmidt's discharge. Accordingly, I would reverse the judge and find that the Respondent violated Section 8(a)(1) by discharging Schmidt in retaliation for his protected activity.

Dated, Washington, D.C. December 16, 2015

Kent Y. Hirozawa, Member

NATIONAL LABOR RELATIONS BOARD

[4] I would also find this post-hoc rationalization to be further evidence of animus. See *Redlands Christian Migrant Assn.*, 250 NLRB 134, 141 (1980).

Edward Castillo, Esq., for the General Counsel.
David J. Fish, Esq., for the Respondent.
Kevin O'Connor, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Chicago, Illinois, on December 10–11, 2013. Charging Party Matthew Schmidt filed the unfair labor practice charge in this case on June 27, 2013, and filed an amended charge on September 26, 2013.[1] Thereafter, on September 27, 2013, the General Counsel issued a complaint in which it alleged that Terraprise Holdings, Inc. d/b/a Global Recruiters of Winfield (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by taking the following actions between December 2012 and April 2013: (a) instructing Schmidt's coworkers not to share work-related information and/or communicate with Schmidt; (b) changing and/or limiting/restricting Schmidt's work assignments and opportunities; and (c) discharging Schmidt on or about April 17, 2013. On October 8 and November 21, 2013, Respondent filed a timely answer (subsequently amended on November 21, 2013) in which it denied violating the Act as alleged in the complaint.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I recommend that the complaint be dismissed. My rationale for that recommendation is set forth below.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, engages in professional recruiting at its facility in Wheaton, Illinois, where it annually provides services valued in excess of $50,000 directly to points located outside of the State of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Company Overview

In 2007, Michael Agnew founded Respondent (a franchise of GRN Corporate), and began serving as Respondent's owner and president. Respondent recruits job candidates for various

[1] All dates are in 2012 and 2013, unless otherwise indicated.

[2] The transcripts in this case are generally accurate, but I hereby make the following correction to the record: p. 410, L. 10: "test data" should read "testator." The exhibits are also generally correct, but I have made the following corrections: R. Exhs. 21 and 65: the cover sheets erroneously state that the exhibits were received into evidence and subsequently withdrawn—instead, I rejected both exhibits when initially offered; R. Exhs. 28 and 32: I removed copies of these exhibits from the exhibit file (and placed them in a labeled envelope) because neither exhibit was offered into evidence.

I also emphasize that although I have included several citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

companies (clients), including companies in the nuclear, manufacturing, oil, and gas industries. To carry out its mission, Respondent employs (among other staff members) project coordinators and recruiters to find candidates for job orders (requests from clients for assistance in finding candidates for positions that typically are difficult to fill), and employs search consultants to communicate with clients. If a client ends up hiring a candidate referred by Respondent, then the client pays Respondent a commission for that hire (normally, a percentage of the candidate's first year's salary and benefits). Respondent, in turn, pays its employees a commission based on the placements that they make (project coordinators receive a 5% commission, while recruiters receive a 10% commission; recruiters also earn a base salary of $25,000). (Tr. 35–37, 62–63, 279, 336, 338–339, 341–344; see also Tr. 556 (noting that Respondent generally has had 7 full-time and 7 part-time employees, and that half of the full-time employees are members of Agnew's family).)

Although Respondent has clients in a variety of industries, over 50 percent of Respondent's revenue comes from its "nuclear desk," a group of four nuclear utilities that are Respondent's clients: Constellation Energy; Energy Northwest (a/k/a Columbia Generating Station); Institute of Nuclear Power Organization (INPO); and Tennessee Valley Authority (TVA). According to Agnew, Respondent's success with placing candidates with nuclear utilities stems from the fact that Agnew has one of the best nuclear utility contact lists in the country, which enables Respondent to contact potential candidates from 59 nuclear power plants. Agnew described the nuclear utility contact list (essentially, a database of potential candidates) as a "goldmine," because the contact list is a readily available inventory of job candidates that Respondent can tap into whenever it receives a job order from a client. In light of its value to Respondent, Agnew was very protective of the nuclear desk, and thus limited access to the nuclear desk to only a small and trusted group of employees. (Tr. 35, 341–342, 349–350.)

By all accounts, Respondent expected its employees to work hard. In particular, Respondent expected employees to devote a significant portion of their day to making telephone calls to candidates (and clients, if appropriate), with the aim of making as many candidate referrals and job placements as possible. Specifically, Respondent expected employees on a daily basis to make a minimum of 60 calls, and plan an additional 80 calls for the following day. To reinforce the importance of "call time," Respondent would keep track of employee telephone calls and post data on each employee's call time on a projection screen in the employee work area. (Tr. 342, 344–345, 348–349, 351; R. Exh. 2.)

Respondent also stressed the importance of arriving on time and being present in the office to keep potential job placements moving forward. To drive home the point, Respondent often (especially with new employees) would lock the door at 8 a.m., and thus require any tardy employees to knock on the door to gain access to the office. (Tr. 345–346, 351–352.) On the other hand, Respondent did encourage its employees to plan ahead for time off, and would generally accommodate requests for time off if given sufficient advance notice (typically, two weeks or more) or if an employee needed time off to deal with an unexpected issue or emergency.[3] (Tr. 352–354.)

B. April 2011—Matthew Schmidt Begins Working for Respondent

On or about April 28, 2011, Schmidt began working for Respondent as a project coordinator assigned to the nuclear desk. In that capacity, Schmidt was responsible for identifying candidates for job orders, building call plans, coaching candidates for job interviews, and otherwise assisting Agnew (who served as the search consultant for the nuclear desk). Schmidt and Agnew were the only people working on the nuclear desk, with the exception of former employee J.J., a project coordinator who left the company approximately two months after Schmidt started. (Tr. 30–35, 355.)

On May 3, 2011, Schmidt signed Respondent's vision statement that "describes who we are, what we are about and where we are going." The vision statement explained that Respondent expected employees to stay on the phone for several hours per day (e.g., to pitch job openings to potential candidates), and also stressed the importance of (among other things) maintaining a positive attitude and being at one's desk and ready for the day by 8 a.m.[4] (R. Exh. 2; Tr. 144–145, 146–147, 342–349.)

C. April 2012—Respondent Promotes Schmidt to Recruiter Position

After an initial period to learn the job, Schmidt performed well as a project coordinator. Accordingly, in April 2012, Respondent promoted Schmidt to a recruiter position on the nuclear desk. As a recruiter, Schmidt continued to identify candidates for job orders, build call plans, coach candidates for job interviews, and assist Agnew, but had the additional responsibility of interacting directly with nuclear desk clients to develop the working relationship, obtain new job orders, and pitch the clients on potential candidates to hire. (Tr. 31, 349, 355–357; see also R. Exh. 50 (indicating that Respondent awarded Schmidt two free days off in March 2012).)

Schmidt continued to perform well on the nuclear desk in his first few months as a recruiter. Specifically, Schmidt made 11 placements in his first five months as a recruiter, and for a period of time ran the nuclear desk largely on his own because Agnew had to be away from the office for 4–6 weeks in May, June and July 2012 due to a family member's declining health

[3] Respondent's employee handbook did warn that repeated absences or tardiness could be grounds for dismissal. (GC Exh. 12, p. 9; see also Tr. 352–353.) Respondent did not distribute its employee handbook to employees, but did keep a copy of the handbook in the employee work area and discuss vacation and sick leave policies with employees when warranted. (Tr. 96, 149–150, 353–354; see also R. Exh. 51 (August 2011 emails between Schmidt and office administrator S.C. about procedures for requesting time off).)

[4] Schmidt pointed out that the vision statement that he signed referred to search consultants and their responsibilities, and that the statement contained information about job duties and scheduling that did not apply to Schmidt since he was a project coordinator at the time. (Tr. 193–194.) While it is true that the vision statement includes some information about the particular duties of search consultants, I find that the vision statement also sets forth general guidelines for all employees regarding phone calls, attitude, and timeliness. Schmidt acknowledged those general guidelines when he signed the vision statement.

(and, ultimately, death). (Tr. 357–358, 436–438, 477–479; see also R. Exhs. 34, 63 (showing that the number of calls that Schmidt made to clients increased significantly in May, June and July 2012).)

In the same timeframe, Agnew met with Schmidt and employee J.L. (a search consultant on the manufacturing desk who was also Schmidt's friend and roommate) and encouraged them to take whatever time off they needed because they were high performing employees. Agnew explained that if they exceeded their normal allotment of 10 days of vacation time, he would deduct any additional leave from their paychecks and return the amount to them at the end of the year in the form of a bonus. Agnew added that if Schmidt or J.L. ever arrived late, they could stay late, as long as they put in a total of 8 hours of work. (Tr. 38, 96–97, 138, 195–196; see also R. Exh. 50 (showing that Schmidt took 51 hours of vacation time from April through September 2012).)

In mid-September 2012, Agnew gave Schmidt a $4000 bonus to assist Schmidt with buying a car to drive to work every day. Up until that point, Schmidt had relied on J.L. for rides to and from work. (Tr. 39–40, 138, 536–537, 539.)

D. September 2012—Employee J.L. Leaves the Company

1. Employee J.L.'s last day at the office

On September 24, 2012, J.L.'s employment with Respondent ended after a heated meeting with Agnew. (Agnew maintains that he merely sent J.L. home for the day, while J.L. maintains that he was terminated. Regardless, September 24 ended up being the last day that J.L. worked for Respondent.) After the meeting with J.L., Agnew called Schmidt and David Dulay (another employee) into the conference room and stated that he (Agnew) sent J.L. home and had to let him go. Schmidt and Dulay did not respond to Agnew's statement because Agnew told them that he was merely letting them know what happened, and did not want to have a discussion.[5] (Tr. 38–39, 241–242, 359, 532–533, 540–541.)

2. Agnew's suspicions about employee J.L.

A few days after employee J.L.'s departure, Agnew learned that on September 20, J.L. had printed out and taken home information from Respondent's database about Respondent's manufacturing clients and candidates.[6] Agnew also learned that J.L. continued to advertise himself as a recruiter after he left his position with Respondent. Based on that information, Agnew formed the impression that J.L. was going to use Respondent's client and candidate information to operate his own recruiting company. (Tr. 360–364, 494–496; R. Exh. 62.)

3. Effect of J.L.'s departure on Schmidt and other employees

J.L.'s departure from Respondent adversely affected the overall morale in the office. Schmidt was particularly uncomfortable with the situation in the office, because J.L. was his good friend and roommate, and J.L. was in a dispute with Agnew about (among other things) the company records that he (J.L.) printed out and took home.[7] (Tr. 138–139.) As Agnew observed, after J.L.'s last day in the office, Schmidt displayed a reduced energy level, a less positive attitude, reduced attendance, a lower level of engagement and teamwork, and a heightened sense of suspicion and negativity. (Tr. 366–368, 486–487.)

More tangibly, J.L.'s departure left a leadership void on Respondent's manufacturing desk. To address that issue, Agnew started spending more time on the manufacturing desk, leaving Schmidt to again take on a larger role with the nuclear desk. (Tr. 94–95, 428–429, 436, 500.) Notwithstanding that opportunity, Schmidt's production on the nuclear desk did not match the level that he reached earlier in 2012. Specifically, as the data in the table below indicate, Schmidt reached a high level of productivity when Agnew was out of the office for much of the summer of 2012, but did not return to that same level in the fall of 2012 when Agnew had to shift his focus to the manufacturing desk:

Month	Schmidt's Calls to Nuclear Desk Clients	Schmidt's Submittals[8]	Schmidt's Placements
April 2012	3	5	1
May 2012	43	16	1
June 2012	87	5	2
July 2012	69	14	1
August 2012	36	8	1
September 2012	12	1	2
October 2012	16	4	0
November 2012	28	7	0
December 2012	18	3	1

(GC Exh. 14 (placements); R. Exhs. 59 (submittals), 34, 63 (calls to nuclear desk clients); see also Tr. 150, 203–204, 357–359, 478–479.)[9]

[5] In early October 2012, Agnew met with Schmidt in the conference room and asked Schmidt if he understood why he (Agnew) gave Schmidt the $4000 bonus. Agnew then explained that he tried to hold off for as long as he could with employee J.L., but could not wait any longer to let him go. (Tr. 41.)

[6] It was not uncommon for Respondent's employees to work outside of the office.

[7] After initially agreeing that he was uncomfortable in the office in light of the developments with employee J.L., Schmidt testified that the ongoing dispute between Agnew and J.L. did not make him uncomfortable. (Tr. 140.) I do not credit that denial since it defies logic, and conflicts with testimony that Schmidt provided only moments earlier. (See Tr. 138–139.)

[8] A submittal occurs when Respondent submits a candidate to a client for an open job order. (Tr. 431.)

[9] In the fall of 2012 (September–December 2012), Agnew made 2 nuclear desk placements and 1 additional placement from a different desk in the office. (GC Exh. 13; R. Exh. 64; Tr. 314.) Agnew also

E. J.L's Unemployment Benefits Case Begins

1. The initial agency decision in J.L.'s unemployment benefits case

On October 11, 2012, the Illinois Department of Employment Security (IDES) made its initial determination in J.L.'s claim for unemployment benefits based on J.L.'s loss of his job with Respondent. IDES denied J.L.'s claim for benefits, finding that:

> The evidence shows that [J.L.] left work at [Respondent's office] because he was not satisfied with the outcome of a meeting he had with [Respondent]. Since [Respondent] was aware of these conditions and had the ability to control such conditions or acts, [J.L.'s] reason for leaving is attributable to [Respondent]. However, because [J.L.] did not exhaust reasonable alternatives in an effort to correct the situation prior to leaving, therefore he is not eligible for UI benefits.

(GC Exh. 5.)

2. Schmidt decides to participate in J.L.'s unemployment benefits case

Later in October 2012, J.L. asked Schmidt if he would testify as a witness in J.L.'s unemployment benefits case against Respondent. In particular, J.L. asked Schmidt to support J.L.'s claim that Respondent terminated him (and therefore rebut Respondent's claim that J.L. quit voluntarily). Initially, Schmidt was reluctant to get involved in J.L.'s unemployment benefits case because Schmidt still worked for Respondent, and J.L. was a personal friend. However, after several conversations with employee S.C., who had also been asked to serve as a witness for J.L. in the unemployment benefits case, Schmidt decided to give an affidavit in the case to deter Respondent from improperly trying to deny benefits to employees in the future. (Tr. 41–44.) There is no evidence that Respondent was aware in this timeframe of the communications that Schmidt, J.L. and employee S.C. were having about J.L.'s unemployment benefits case.

3. Telephone hearing scheduled for the unemployment benefits case

On November 1, J.L. appealed the adverse initial decision on his claim for unemployment benefits. IDES initially scheduled the case for a telephone hearing on December 20, but later rescheduled the hearing for January 29, 2013. (GC Exh. 6.)

served as the search consultant for 5 other placements that were arranged by one of Respondent's recruiters or project coordinators. (R. Exh. 64; see also Tr. 426–428.)

F. Agnew Seeks Guidance on How to Best Work with Schmidt[10]

On October 17, Agnew emailed two members of GRN Winfield's corporate staff to express concerns that he was having about working with Schmidt, and to seek guidance on how to improve their working relationship or otherwise address the problem. Agnew stated as follows in his email:

> Yesterday, as my wife . . . was dropping off my daughter . . . to clean the office, Matt interacted with her with the following statement, "I can't wait until 5:00." While it raised a caution flag in the midst of a busy evening, I awoke an hour ago with the red flag of concern. To this moment, **I am not sure if I am being paranoid, but I am highly suspicious.** I am gathering others assessment of the situation and recommendations as there is wise counsel with many counselors.
>
> Total Replacement Strategy is floating through my head. Tomorrow I meet with [J.L.] and his lawyer. **I am concerned that Matt, [J.L.'s] former roommate and his friend, could bide his time to join [J.L.] when [J.L.] gets started** – which I assume he will do. I do not want to drive him to that action by broadcasting my suspicion. I do not want to be gullible to the fact that that could happen[.] I want him to succeed at GRN Winfield for years to come as he has demonstrated the ability to work well with me and to produce (13 placements to date this year).
>
> You know the rule: the first time you think of firing someone, it is time to do it. Not sure if this is that time, but I am going to give some behavioral observations and will look forward to your assessment. (Man, I wish I was sleeping instead of worrying about this!)
>
> **Matt's calling behavior is unproductive and he is clearly in a slump. Our suspicion of one another is high.** Yesterday, in the morning meeting, he was "working me" to get a trip to the Super Bowl if we hit 1.6 mm and 350k in this quarter. (By the way, I said I would consider it is contingent on the real cost.)
>
> Another interaction yesterday was a typical "Pink Sheet" conversation about how the office was going. **I am working more on the forging desk and he is not filling the jobs on the nuclear desk.** I have some candidates in interviews on the nuke and 2 of 3 offers pending. I am working in a limited fashion as I work the manufacturing desk (for good or ill) and

[10] In this section, I discuss two emails that Agnew wrote in the fall of 2012 to seek assistance from Respondent's corporate staff about how to work with Schmidt. I admitted these emails into evidence over the General Counsel's and Schmidt's hearsay objections because the emails are admissible for the nonhearsay purpose of establishing Agnew's state of mind when he wrote the emails, and for the nonhearsay purpose of establishing Agnew's motivation for various actions that he subsequently took regarding Schmidt. See *Continental Can Co.*, 291 NLRB 290, 294 (1988). In relying on these emails as evidence of Agnew's state of mind and motivation, I also find that the emails are credible and reliable (i.e., not fabricated or prepared with an eye towards setting up a defense for future litigation).

> increase my SMP activity. **He has nothing – no interviews and is lethargic and negative.** This behavior is not common. In a gentle and non-confrontational manner, we did have a conversation about productivity. **His reasoning for not being productive was that he stated that I asked him not to connect with the hiring managers of our clients. Honestly, I can't remember saying that, but with the suspicion rampant right now, maybe I did.**[11]
>
> Last week, I had to check him on his negativity. I am hiring another person and likely to work on my desk as a PC. In relation to his candidacy, he publically made the most negative statements. "I do not believe this guy will ever be successful here and we will just be wasting our time." I am glad for that opinion, but it was in public with Matt and I both knowing he was better than some that have made it in the office. On another occasion, he made a blanket negative statement to this regard. In both cases, they were not points in the decision making process, but a statement of conclusion: "If you do anything other than this, you are an idiot." When I pointed this out, he seemed to get it and humbly apologized. My point: I want your opinion, but stating it with some temperance or in private is better than in public and almost like a challenge not to go in a direction other than what Matt says.
>
> **Action Plan in my head for your review**: 1. Have Jolie [Wilson] speak with him and assess what is going on; 2. Have Bill Smyser do some desk side support; **3. Train a new person on my desk.**

(R. Exh. 36 (emphasis added); Tr. 486–487 (explaining that after J.L. left the company, there was some level of mistrust in Agnew and Schmidt's relationship, and Agnew was hoping to get past that problem and move forward); see also Tr. 368–373.)

Agnew continued to have concerns about Schmidt's work ethic in November 2012, believing that Schmidt's presence in the office was bringing down the overall energy level in the office because although Schmidt was the longest tenured employee, he was not demonstrating a positive attitude and was slowing down in his call time. (Tr. 377–378.) Accordingly, Agnew sought guidance from Jerry Hill (a consultant with the GRN Winfield corporate office), stating the following concerns in a November 27 email:

> . . . Here is my situation: My tenured floor person is Matt Schmidt. Matt, [M., D. and S.] all see that we have a work ethic problem. I need your advice and support to get out of this rut and move to a new level of energy. Help!
>
> Here is some history you know well. Matt by choice wanted to be a PC on my desk. He is a great guy and works well with me – a pretty tough row to hoe! That said, Matt is not a high energy, high work ethic guy. With [J.L.'s] departure, we both went into a period of suspicion and funk and challenge.
>
> Interestingly, [D. and S.] first noted the problem a month ago. Matt and I [met] Friday and we concurred. Matt took appropriate responsibility. . . . I have challenged Matt to take leadership in finding candidates that are hard and to lead the effort to change the work ethic of the floor. I did this based on Jolie's wise counsel to challenge Matt.
>
> Thanks for your partnership, Jerry. No one can do desk side support and creation of a great floor more than you. Let's see if we can make it happen in 2012!

(R. Exh. 48; see also Tr. 377 (noting that in the meeting referenced in the email, Agnew and Schmidt talked about absenteeism and showing up late, and about call planning and getting call plans ready).)

G. December 2012—Schmidt and S.C. Give Affidavits in J.L.'s Unemployment Case

On December 18, Schmidt and S.C. gave affidavits to J.L.'s attorney for J.L.'s unemployment benefits case against Respondent. In his affidavit, Schmidt (among other things):

> (a) described the statements that Agnew made regarding J.L. and his last day at the company (specifically, that Agnew said he "had to let J.L. go");
>
> (b) stated that he rode to work with J.L., but later received a $4,000 bonus from Agnew to assist with buying a car to drive himself to work; and
>
> (c) explained that Agnew asked employees to print lists of contacts for making calls so employees could continue making calls in the event of a power failure or the loss of access to the company's database of phone numbers.

(GC Exh. 2; see also Tr. 44–45; Findings of Fact (FOF), Section II(D)(1), supra.) Employee S.C., meanwhile, provided the following information in S.C.'s affidavit:

> (a) On September 24, Agnew asked employee D.D. to describe an incident where J.L. declined to take a phone call from Agnew because J.L. was finishing a call with a client. Agnew stated that "he did not want someone working for him who does not want to talk to him," and then stated that would be "sending [J.L.] home today."
>
> (b) Also on September 24, Agnew directed S.C. to contact Respondent's technical support provider to ask that J.L.'s account (including his access to email, remote login, and Respondent's software and database) be terminated within the next 30–40 minutes.
>
> (c) After Agnew and J.L. met on September 24, J.L. went to his desk and collected his personal belongings, and then left the building.

[11] At some point, Agnew tried to address Schmidt's belief that he was not permitted to speak directly with client's hiring managers by assuring Schmidt that he (Agnew) would not get in Schmidt's way, and that Schmidt should just focus on making placements. (Tr. 371.)

(d) On at least one occasion earlier in the year, Agnew intended to terminate J.L. because of what S.C. believed was a strong and consistent conflict in personalities. S.C. attempted to persuade Agnew to use an alternative method to resolve his differences with J.L., and Agnew did not terminate J.L. at that time.

(e) It is Respondent's policy, as communicated by Agnew, that employees print lists of contacts for making calls so employees can continue making calls in the event of a power failure or the loss of access to the company's database of phone numbers.

(GC Exh. 3; see also Tr. 44–45.)

In the morning on December 19, J.L.'s attorney faxed Schmidt's and S.C.'s affidavits to Agnew and Respondent's attorney. (GC Exh. 4; see also Tr. 277–278, 382.) Later that morning, Agnew (who was sitting at a desk near Schmidt and other employees) pounded his fist on the desk, and then stood up and stormed out of the office. Agnew did not return to the office until after lunch. (Tr. 48.)

Later on December 19, Schmidt was working at his desk when Agnew inadvertently sent him a copy of an email "chat" between Agnew and his attorney. In the email, Agnew stated that he thought Schmidt's and S.C.'s affidavits "hurt us, but I think we'll be okay." When Schmidt sent an email to Agnew to ask if the message was intended for him, Agnew asked Schmidt to come to the conference room for a meeting.

During the meeting, Schmidt told Agnew that he never wanted to be a part of J.L.'s unemployment benefits case, but felt that he had to do what is right, and accordingly told the truth in his affidavit about what he knew. When Agnew asserted that he did not terminate J.L., Schmidt reminded him of the things he (Agnew) said about letting J.L. go. Agnew replied that sometimes his head says different things than his heart, and he says things that he does not mean. Agnew concluded the meeting by telling Schmidt that "a couple of things can happen from this: we can let this pull us apart; we can grow from this; or we can part ways." Schmidt responded that he "would like to make this work."[12] (Tr. 49–55, 182.)

[12] During the trial in this matter, Respondent objected to Schmidt's testimony about Agnew's email chat with Respondent's attorney on the theory that the email chat was protected by the attorney-client privilege. Respondent's counsel added that the privilege was not waived because Agnew's disclosure to Schmidt was inadvertent. The General Counsel and the Charging Party took the position that Respondent waived the privilege. (Tr. 50–51.)

I agree with the General Counsel and the Charging Party that Agnew, acting as the client, waived the attorney-client privilege here. While it is true that Agnew's initial disclosure of the email chat to Schmidt was inadvertent, he did not attempt to correct the error by notifying Schmidt that the communication was not intended for him. To the contrary, Agnew reinforced his waiver of the attorney-client privilege by setting up a meeting with Schmidt in which they discussed the email chat and its implications. Respondent took no further action regarding the email chat until it attempted to invoke the privilege at trial nearly one year after the disclosure. Based on those facts, I find that Respondent waived any attorney-client privilege regarding the December 19, 2012 email chat.

H. January 2013—A Fresh Start?

1. Initial positive interactions

On January 3, 2013, Agnew provided Schmidt with a report containing data about the work that Schmidt performed in 2012. On the report, Agnew wrote: "Matt, Per your request. All my best for a great 2013, Mike." (R. Exh. 38; see also Tr. 385–386, 388.) Also in early January, Schmidt learned that he was awarded a space on the annual "peak performers' trip" to the Bahamas based on his overall performance in 2012. The trip, which was awarded to high performing employees from various offices of GRN Winfield, was scheduled for March 2013. (Tr. 37, 594–595.) Notwithstanding these initial positive overtures, Schmidt and Agnew continued to have a somewhat rocky working relationship.

2. Changes to the nuclear desk

In fall 2012 and early 2013, Agnew made changes to the nuclear desk that led Schmidt to believe his opportunities to make placements were being limited. First, Schmidt believed that Agnew directed him to limit his direct client contact calls (e.g., calls to hiring managers and the like) to Constellation Energy,[13] a large nuclear utility that was one of four nuclear clients covered by the nuclear desk.[14] Although Schmidt believed that he was being cut off from working with the three other nuclear clients (Energy Northwest, INPO and TVA), he still received job orders for those clients, including TVA, which was a limited source of job orders because it was on a hiring freeze. Moreover, Schmidt's calls, submittals and placements to nuclear desk clients in early 2013 matched or exceeded his figures from fall 2012 even though the majority of Schmidt's client calls in 2013 (70 out of 73 client calls)[15] were to Constellation Energy:

[13] Although Schmidt testified (rather tentatively) that he believed Agnew instructed him to limit his client contact to Constellation Energy in or about January 2013 (see Tr. 58–59, 574–575), Agnew understood that Schmidt became worried about limited client contact as early as October 2012. (See FOF Section F, supra.)

[14] Schmidt had a positive history with Constellation Energy because he had devoted a considerable amount of time towards improving Constellation Energy's working relationship with Respondent, and towards encouraging that company to send more job orders to Respondent. (Tr. 59, 192–193.) Because of that history, I do not credit Schmidt's testimony that Constellation Energy was a poor assignment (because of a lower reimbursement rate or otherwise) – Schmidt's own testimony that he revived Constellation Energy as a good source for business refutes his claim that Constellation Energy was not a desirable client, along with the fact that half (5 out of 10) of the placements that Schmidt made for Respondent as a recruiter were at Constellation Energy. (Tr. 212–213; GC Exh. 14.)

[15] In fall 2012, 36 of Schmidt's 74 client calls were to Constellation Energy. (GC Exh. 23; R. Exhs. 34, 63.)

Month	Schmidt's Calls to Nuclear Desk Clients	Schmidt's Submittals	Schmidt's Placements
September 2012	12	1	2
October 2012	16	4	0
November 2012	28	7	0
December 2012	18	3	1
January 2013	22	9	0
February 2013	29	5	1
March 2013[16]	16	8	0
April 2013[17]	6	5	0

(GC Exh. 14 (placements); R. Exhs. 59 (submittals); 34, 63 (calls to nuclear desk clients); see also FOF Section II(D), supra; Tr. 58–62, 94–95, 134–135, 224, 423–424.)

Second, in January 2013 Agnew assigned an additional employee (O.C.) to the nuclear desk. (Tr. 62–63; see also Tr. 64, 94 (Schmidt believed that Agnew's decision to add staff to the nuclear desk reduced the number of job assignments that Schmidt received, and reduced the quality of those job assignments).)[18] Thus, for example, on January 14, Agnew assigned Schmidt three job orders (two from Constellation Energy and one from INPO) and assigned O.C. four job orders (two each from Constellation Energy and Energy Northwest). In making these assignments, Agnew emphasized that Schmidt's assignments were "at a higher level" because he did not want Schmidt to feel threatened by O.C.'s involvement with nuclear desk assignments. (R. Exh. 10; Tr. 393–394; see also Tr. 180–182, 226–228 (Schmidt believed the positions he was assigned were difficult to fill, but acknowledged that he had success in filling those positions (or similar ones) during his tenure with Respondent).)

At the same time that these changes were occurring, Agnew and Schmidt were having trouble communicating and coordinating about the parameters of Schmidt's responsibilities. For example, in early January 2013, one of Respondent's search consultants (former employee W.M.) unexpectedly resigned. Schmidt began working on placing a candidate that W.M. had identified, because the job order was for Constellation Energy, which Schmidt believed was his client. By treating W.M.'s candidate as his own, however, Schmidt raised the ire of Agnew, who believed that Schmidt improperly kept a viable candidate "out of the loop," such that the candidate ended up accepting a job with another company instead of the position that Respondent was trying to fill. (Tr. 441–443, 576–577.)

Agnew and Schmidt were at odds again in mid-January 2013, when Schmidt began identifying candidates for a chemistry manager position, but believed that his hands were tied because most of the viable candidates were set aside on a call list that was reserved for Agnew. To address this issue, Agnew emailed the following message to Schmidt on January 14:

> Matt: You said you needed more names and wanted to call on the list developed for me. My plan was to give you a first shot at this. Please take 10 names of Chemistry Managers/Supervisors of your choice today to expand your chance of a hit. I will start calling after today. Coordinate which names you want to take from my call plan with DP.

(R. Exh. 11.) Schmidt, however, did not find Agnew's offer to be satisfactory, because Schmidt (mistakenly) believed that Agnew was only giving him one afternoon to call candidates that Agnew himself would begin calling the next day. (Agnew's intent was to only call the remaining candidates on his list after Schmidt picked the ten candidates he wanted.) (Tr. 109–111, 183–184, 394–397.)

3. Inclusion in work meetings and discussions

Schmidt also had concerns about being included in staff meetings about ongoing job orders and other work-related topics. Specifically, Schmidt explained that Agnew told him he did not need to attend certain regularly scheduled recruiting meetings[19] (held on Tuesdays and Fridays), and also did not invite him to attend several other meetings that he (Agnew) held with various employees over the course of the day. Schmidt viewed this as a negative development even though it was not uncommon for Agnew to hold meetings that were attended by some, but not all, employees (particularly if the purpose of the meeting was to address assignments or topics that related to only a subset of employees in the office). (Tr. 64–65, 137–138, 260–262, 468–469.)

4. Absenteeism

In early 2013, Schmidt had to miss all or part of four work days, primarily because of court dates for his child support[20]

[16] Schmidt and Agnew were out of the office from March 3–8, 2013, to attend the peak performers' trip to the Bahamas. (R. Exh. 50.)

[17] Respondent terminated Schmidt on April 17, 2013. (See FOF, Section II (P), infra.)

[18] I do not credit Schmidt's testimony that the job assignments he received were of poor quality (when compared to assignments given to other employees, or otherwise). Schmidt was equivocal about this assertion when questioned about the quality of specific job orders, and the evidentiary record shows that it is not generally possible to characterize job orders as "good" or "bad" in quality, since (for example) a high level position may be difficult to fill, but then produce a good commission if filled, while a lower level position may be easier to fill, but produce a lower commission. (Tr. 94, 103–106, 180–182, 226–228.)

[19] At recruiting meetings, employees might complete a training program, or discuss sales goals or developments in the industries that Respondent served. (Tr. 100–101.)

[20] Schmidt explained that he had court dates in his child support case because the court erroneously believed that the mother of Schmidt's son had custody (in fact, Schmidt's son had moved in with his grandmother). Because of that error, the court erroneously charged Schmidt for child support, and was preventing Schmidt from obtaining a passport that he would need to attend the peak performers' trip to the

and DUI cases, and because of a car accident that caused transportation problems and also led to court dates. Although Schmidt did not always provide Respondent with advance notice of his need to be late or absent to attend to these matters, there is no evidence that Respondent took action against Schmidt for absenteeism in this time frame other than to charge Schmidt for vacation time to cover the time that he was not in the office (with paycheck deductions for excess vacation time used, if necessary). (R. Exh. 50; see also Tr. 150–155, 439–445, 578–581.)

I. J.L.'s Unemployment Benefits Case Concludes

On January 29, Schmidt and S.C. testified as witnesses in J.L.'s unemployment benefits case against Respondent, with each providing testimony that was consistent with their December 2012 affidavits.[21] Agnew and his attorney were present when both Schmidt and S.C. testified. (Tr. 55–57, 399–400.) Subsequently, on January 31, an administrative law judge with IDES ruled that Agnew terminated J.L. for reasons other than misconduct, and accordingly found that J.L. was eligible for unemployment benefits. (GC Exh. 7.)

J. February 2013—Agnew and Schmidt Continue to Struggle with Their Working Relationship

1. Early February—more positive overtures

In the initial days after J.L.'s unemployment benefits case, Schmidt and Agnew worked together on the nuclear desk without incident. Schmidt and Agnew traded emails about a potential candidate for a job order, and Agnew also congratulated Schmidt on making his first placement in 2013.[22] (R. Exhs. 12, 15–16; see also Tr. 114–115, 129–130, 177–178, 397–399, 402.) In addition, after meeting with a consultant on February 8 to evaluate the team of employees in the office, Agnew decided that notwithstanding his and the consultant's concerns about Schmidt's attitude, he (Agnew) should work with Schmidt to "keep a good, professional, productive, mutually beneficial relationship," and, in short, "[m]ake [Schmidt] my . . . man." (R. Exh. 35; see also Tr. 403, 411–415.)

2. February 11 – Argument about feelings after the IDES hearing

On or about February 11, Schmidt met with Agnew and stated that he (Schmidt) felt like he was being punished and that it seemed like other employees were getting better job orders while Schmidt received lower level job orders. Agnew responded by telling Schmidt that he (Agnew) was not there to talk about Schmidt's feelings, and then asked Schmidt what jobs he was working on. Agnew then stopped talking about job assignments, and the following exchange occurred:

> Agnew: Fine, if you want to talk about your feelings, let's talk about your feelings.
>
> Schmidt: I don't really have anything to say.
>
> Agnew: Let's talk about my feelings. How do you think it felt when you used the bonus I gave you against me in the hearing? How do you think that made me feel? Let's talk about feelings. Why don't you go to lunch and think about my feelings and how you made me feel.

Agnew then pushed a $20 bill towards Schmidt and repeated his directive that Schmidt go to lunch. Schmidt complied.[23] (Tr. 66–68.)

Notwithstanding the February 11 confrontation, in the following weeks Agnew and Schmidt resumed normal communications. For example, Agnew sent Schmidt information about the upcoming peak performers' trip, and also provided Schmidt with information to assist Schmidt with two pending job orders.[24] (R. Exhs. 17–19; Tr. 123–124, 131–132, 187–189.)

3. Additional absenteeism

In February, Schmidt missed all or part of five work days, primarily because of car related issues, court dates (including court dates needed to clear the way for Schmidt to obtain a passport), and oversleeping on one occasion (February 13). As with January 2013, there is no evidence that Respondent took action against Schmidt for absenteeism in this time frame other than to charge Schmidt for vacation time to cover the time that he was not in the office (with paycheck deductions for excess vacation time used, if necessary). (R. Exh. 50; see also Tr. 156–157, 225, 445–449, 581–584, 592–594.)

K. March 1, 2013 – Office-Wide Reminder about Attendance Policy

On March 1, at Agnew's direction, S.C. sent an email to all staff to "review a few of our standard operating procedures per the Employee Handbook." S.C. highlighted the following procedures, among others:

> Attendance
>
> To be successful in this job requires a heightened degree of

Bahamas. Accordingly, Schmidt had various court dates to resolve the child support matter. (Tr. 153–154, 208–209, 527–528, 577–578.)

[21] At some point between December 19, 2012 and the January 29, 2013 hearing, Agnew called all employees into a meeting and advised them that he expected them to tell the truth if called to testify at J.L.'s unemployment benefits hearing. (Tr. 140–141, 252–253, 383.) Agnew's attorney also told Schmidt and other employees that they should tell the truth if called to testify. (Tr. 140–142, 252.)

[22] At trial, Schmidt characterized Agnew's congratulatory email as part of a strategy that Agnew had of praising Schmidt in emails, but reprimanding him publically. (Tr. 184–185.) I do not credit Schmidt's characterization because it is unsupported by the record (which includes some emails that praise Schmidt, and others that reprimand him for performance), and nothing in Agnew's congratulatory email suggests that Agnew sent it with an ulterior motive.

[23] Schmidt's account of this conversation with Agnew was not rebutted.

[24] I do not credit Schmidt's testimony that Agnew sent these emails as false leads or with ill will. Schmidt did not have a basis for testifying (or speculating) about Agnew's intentions in sending the emails, and regarding one of the emails (R. Exh. 18), Schmidt admitted that he could not remember the candidate that Agnew discussed in the email. (Tr. 185–187, 190–191.) Schmidt was also a bit too eager (after a leading question that drew an objection that I sustained) to assert that Agnew became more rude when responding to work related questions after December 18, 2012, the day that Schmidt gave his affidavit in J.L.'s IDES case. (Tr. 191.)

> discipline. Being here to do the job is essential. But because we work in a team environment, your absence can also have a detrimental impact on your co-workers productivity and success. **If your absence from work becomes repeated and/or excessive, you will be terminated or placed on a Performance Improvement Plan (see Performance Improvement Plan below).** Being punctual is another one of those necessary disciplines. We understand that events (road construction, accidents, sick child, etc.) may arise from time to time that prevent you from getting to work on time. If this becomes repeated and/or excessive, you will be terminated or placed on a Performance Improvement Plan. Please give the office a call if you are going to be late or if you are unable to be at work due to some emergency (leave a message if no one answers). If the weather is bad and traffic could be an issue, please leave a few minutes earlier than normal so you are not late.
>
> Performance Improvement Plan
>
> If an individual's performance is not at a satisfactory level for any consecutive period, they may be placed on a "Performance Improvement Plan." During the subsequent period, the employee's performance will be monitored closely and appropriate training, coaching and mentoring provided. The employee's performance will be assessed daily to pinpoint areas of weakness and offer suggestions and appropriate actions for improvement. If at the conclusion of the Performance Improvement Plan the employee's performance has not elevated to a reasonable and acceptable level, as defined in writing by the employer, and agreed to by the employee, at the beginning of the Performance Improvement Plan, their employment may be terminated. If the employee elects not to continue under the terms of the Performance Improvement Plan, it will be regarded as a "Voluntary Resignation," effective the end of that business day.

(R. Exh. 20 (emphasis in original); see also GC Exh. 11 (note from S.C. to Agnew to explain that she added the language about the possibility of being terminated for excessive absences because that language was not in the employee handbook); GC Exh. 12 (employee handbook containing attendance policy language from December 2011); Tr. 298–302, 304–305, 308.) Schmidt acknowledged receiving S.C.'s March 1 email about attendance, but asserted that he had not seen the attendance policy before that date. (Tr. 175–176, 203.)

On the same day that S.C. sent her email about Respondent's attendance policy, Schmidt was out of the office for 7 hours to obtain his passport. Agnew was frustrated that Schmidt had to be absent to resolve the issues with his passport, but supported Schmidt's absence from the office that day because it was necessary for Schmidt to be able to go on the peak performers' trip. Accordingly, Respondent took no action against Schmidt for being absent on March 1. (Tr. 158, 210, 449–451, 584; R. Exh. 50.)

L. March 3–8, 2013—The Peak Performers' Trip

From March 3–8, 2013, Agnew and Schmidt attended the GRN Winfield peak performers' convention at the Atlantis resort in the Bahamas. Agnew's family also attended, as did one of Schmidt's friends. Convention sessions were scheduled in the morning on March 4–5, but otherwise convention attendees were generally free to enjoy the resort on their own. (R. Exh. 17, pp. 3–4; Tr. 115–117; see also Tr. 415 (noting that although the corporate office of GRN Winfield organized the trip, Agnew paid for the cost of Schmidt's trip because that was Agnew's responsibility as a company franchise owner).) During the trip, Agnew paid for Schmidt and his friend to join him (Agnew) in riding jet-skis during one afternoon. Agnew and Schmidt also attended company functions at which Schmidt spoke with various respected corporate officials and industry leaders. (Tr. 117–120, 204–205, 207–208, 585–586; R. Exhs. 56–58.)

M. Agnew Assigns Nuclear Desk Work to Additional Employees

In March 2013, Agnew began assigning nuclear desk work to employees D.Da. and David Dulay. Dulay also received assignments from the oil and gas desk and the metals/manufacturing desk to ensure that he had a sufficient amount of work to stay busy. Schmidt believed that D.Da. (and O.C., who joined the nuclear desk in January) were being assigned "better" job orders, and were also taking away assignments that would otherwise have gone to Schmidt. (Tr. 63–64, 243–244, 250–252.)

At some point after Dulay began doing nuclear desk work, Agnew instructed him not to speak to Schmidt about his work assignments. Agnew repeated that instruction to Dulay on multiple occasions, including one incident where Agnew observed Schmidt and Dulay talking at their desks and made a throat slashing gesture (that both Schmidt and Dulay observed) to indicate that Dulay should stop talking to Schmidt about what he was working on (Agnew's rationale was that Schmidt did not need to know about assignments, such as work from the manufacturing desk, that were not related to Schmidt's success). (Tr. 86–87, 245–247, 469.)

Schmidt also observed that Agnew did not list one of the jobs assigned to D.Da. on the "update on jobs" sheet (although Schmidt found that the job was listed in Respondent's computer database). Schmidt concluded that Agnew did not list the job on the update sheet because Agnew did not want Schmidt to know about it. (Tr. 70–72.)

N. Mid-March, 2013 – Respondent Places Schmidt on a Performance Improvement Plan

In mid-March, Agnew, Schmidt and S.C. met to discuss Schmidt's performance. During the meeting, Agnew told Schmidt that his production numbers were not as strong as they used to be. Agnew also told Schmidt that his attendance was not satisfactory, and emphasized that Schmidt needed to arrive at work on time. Agnew placed Schmidt on a performance improvement plan (albeit one that was not in writing) aimed at addressing the weaknesses in Schmidt's performance. (Tr. 160–162, 198–199, 453–456; see also Tr. 456 (noting that Agnew did not fire Schmidt at this point because he needed someone on the nuclear desk and Schmidt was the best person that he had); R. Exh. 22 (email dated March 27, referencing a meeting "last week" with Schmidt about attendance).) Schmidt was

surprised that Agnew was unhappy with his attendance since Respondent had approved vacation or sick leave for Schmidt's previous absences and tardies. (Tr. 196–198.)

O. March/April 2013—Conflicts between Agnew and Schmidt Persist

1. March 27—Schmidt arrives late for work

Despite having been advised by Agnew that his attendance was unsatisfactory, on March 27, Schmidt arrived to work one hour late because he overslept. (Tr. 158–159, 167, 461; R. Exh. 50.) S.C. emailed Schmidt about his late arrival (with Agnew copied on the email) and stated as follows:

> Hey Matt,
>
> In the conversation you had with Dr. Agnew, [D.P.], and I last week, you were informed that your attendance has been unsatisfactory. This morning, you were an hour late which isn't the behavior we were expecting after the conversation we had. This pattern of behavior has a negative impact, obviously on you as well as others, and we want to encourage you to address this pattern.
>
> If you want to discuss this further, please set up a meeting with me, [D.P.], and Dr. Agnew.

(R. Exh. 22; Tr. 163–165.) After this incident, Agnew decided that he should fire Schmidt.[25] (Tr. 462.)

2. Respondent removes Schmidt's remote access

Consistent with Agnew's decision to fire Schmidt, on March 27, Agnew directed employees D.P. and S.C. to remove Schmidt's work account remote access privileges because Agnew feared that Schmidt would take information from Respondent's database, leave the company, and join former employee J.L. in running their own recruiting business.[26] (Tr. 280–281, 463; GC Exh. 8, p. 1.) A few days later, Schmidt attempted to use remote access, and discovered that he could not log in. Schmidt asked D.P. and S.C. about the problems he was having with remote access, and subsequently learned that he should speak to Agnew about the issue since Agnew was the one who decided to remove Schmidt's remote access privileges. (Tr. 73–77.) Schmidt asked Agnew about his remote access privileges when they met on or about April 10, and Agnew responded that he removed Schmidt's access because Schmidt had not logged in for a while. Schmidt pointed out that Agnew did not remove his remote access in the past when Schmidt did not log in, but did not attempt to argue the issue further. (Tr. 83–84.)

On April 11, Agnew instructed D.P. and S.C. to remove the remote access privileges for all of Respondent's full time callers (recruiters, search consultants and project coordinators) unless there was a rationale for not doing so. With the assistance of Respondent's technical support provider, D.P. and S.C. carried out Agnew's directive. Agnew then met with employees on April 12 and announced that if they were not using remote access from home, then their remote access privileges would be removed. (GC Exh. 8, p. 2; Tr. 84–85, 247, 282–287, 297.) On April 19 (two days after Respondent terminated Schmidt's employment), Agnew instructed Respondent's technical support provider to restore all employees' remote access privileges, but emphasized that his request "excludes those not employed of course." (GC Exh. 10; Tr. 248, 297.)

3. Disagreement about job order calling plan

On or about April 3, Agnew met with Schmidt and D.Da. to discuss the plan for identifying and contacting candidates for an electrical engineering position at Constellation Energy. According to Agnew, since multiple employees would be working on the same job order, he divided up the candidate research by instructing Schmidt to identify candidates that were currently employed by a nuclear power plant, while O.C. would identify candidates from A&E/OEMs (entities that provide services to nuclear power plants), and D.Da. would identify candidates from fossil power plants. Schmidt stated that he wanted to look for candidates outside of nuclear power plants, but Agnew said no.[27] (R. Exh. 25; see also Tr. 80–81, 473.) By April 9, Schmidt had prepared his list of candidates to call. (R. 25.)

On April 10, Schmidt requested a meeting with Agnew to talk about how things were going in the office.[28] In that meeting, Schmidt told Agnew that he testified in J.L.'s case because he needed to, and not to hurt Agnew. Schmidt added that while

[25] In this same timeframe, Agnew's belief that Schmidt was not working out in the office was reinforced when Agnew's son Robert reported that Schmidt said Robert was "lucky" to only have to work for one hour on the day that Robert and Schmidt spoke in the office. (Tr. 462–463.) Although Schmidt explained at trial that he was only joking (see Tr. 590–592), I credit Agnew's testimony that he viewed Robert's report of Schmidt's comment as further indication that Schmidt had a poor attitude about working for Respondent. Indeed, Agnew expressed concerns about similar remarks in October 2012, before Schmidt gave his affidavit and testified in J.L.'s unemployment benefits case. (See FOF, Section II(F) (Agnew expressed concerns about Schmidt's comment that he could not wait until 5:00 p.m.).)

[26] I give little weight to Agnew's additional explanation that he also removed Schmidt's remote access because a corporate official incorrectly advised him that Schmidt (and a high school intern whose remote access was also terminated) was not using the remote access feature. (Tr. 463–464; see also Tr. 281–282, 287–291, 293; GC Exh. 9.) Respondent's remote access records do not support a claim (by a corporate representative or anyone else) that Schmidt was not using remote access (see GC Exh. 9), and Agnew had no discernible motive to remove Schmidt's remote access other than the fact that he (Agnew) planned to terminate Schmidt in the near future and feared that Schmidt would take Respondent's records before he left the company. To be sure, Agnew gave the "you weren't using remote access" explanation to Schmidt when Schmidt asked him why his remote access was removed. (See Tr. 83–84.) I find, however, that Agnew merely used that explanation to avoid telling Schmidt the truth – that Agnew planned to fire Schmidt in the near future.

[27] Schmidt admitted that he believed it was "very unfair" that D.Da. was assigned the task of finding candidates in fossil power plants. In Schmidt's view, he had devoted a lot of time to expanding into that market, only to have that market "immediately taken away from me." (Tr. 81.) For that reason, I credit Agnew's testimony that Schmidt stated in the April 3 meeting that he wanted to research candidates outside of nuclear power plants.

[28] This is the same meeting in which Schmidt asked Agnew why his remote access privileges were taken away. See Findings of Fact (FOF), Sec. II (O)(2), supra.

he did not say anything untrue when he testified, he nonetheless wanted to apologize to Agnew if Schmidt's decision to testify hurt Agnew. Finally, Schmidt stated that he knew that he had been punished for testifying, and forgave Agnew for doing that. (Tr. 77–80.)

Agnew did not respond to Schmidt's apology (other than to say "okay"). Instead, Agnew admonished Schmidt because the candidate list that Schmidt prepared for the Constellation Energy job order included candidates from A&E/OEMs, a source that Agnew assigned O.C. to research. Schmidt responded that Agnew told him to focus on "nuclear," which included both power plants and A&E/OEMs. Schmidt added that O.C. was not present for the April 3 meeting when Agnew discussed candidate research duties, but then apologized for the misunderstanding. (Tr. 80–83, 473.) Agnew subsequently admonished Schmidt in an April 10 email, stating as follows:

> Matt:
>
> I am glad you see a real possibility with the candidate you have from the non-utility sector for the electrical engineering role at Constellation. While I applaud your effort and energy, I need to make roles clear. Per the April 3, 2013 meeting, we discussed who was focusing on which sectors to source candidates for these roles. Your focus was to be on sourcing candidates from the nuclear utilities, a role that I have clarified on multiple occasions. [O.C.] was to focus on sourcing candidates from A&E/OEM's and [D.Da.] was to focus on fossil. We divided it up this way so we could comb the market efficiently and in an organized manner. I was surprised that you had several people on your plan yesterday and today who were from A&E/OEM's and are submitting people from A&E/OEM's when your focus is to be on nuclear utilities.
>
> While again, I applaud your effort, for me to run an office with multiple recruiters working on the same job orders, we have roles segmented in a logical manner. If you had come to me and asked to discuss candidate sources, we could have determined that you sourcing candidates from A&E/OEM's would be ok. To source and submit candidates who are from A&E/OEM's when I directly stated that you were to focus on nuclear utilities, since others are sourcing from A&E/OEM's, is something to address. Let's find a way for you to continue to source candidates successfully while maintaining role clarification.
>
> That said, you did excellent research and that was good!

(R. Exh. 25.) To explain how he understood the candidate research roles for the electrical engineer job order, Schmidt sent Agnew the following reply:

> Mike
>
> You stated to me that it was ok to look outside of nuclear and that you were taking [D.Da.] off the project. I have worked very hard to cultivate this relationship with [N., a human resources official at Constellation Energy] and Nine Mile and have also been working with [N.] on permission to search outside of the nuclear utilities. The reason being that the pool of electrical engineers within nuclear has almost depleted. [O.C.] was not on the call with us when we clarified roles and I was unaware (as was he) until today that you were going to place him on this search.
>
> If this is how you would like to proceed I apologize and will immediately terminate my search outside of the nuclear utilities per your command.

(GC Exh. 21; Tr. 589–590; see also Tr. 472.)

On April 11, Schmidt devoted much of the day to putting together a new list of candidates to call about the electrical engineering position with Constellation Energy, since his original list generally was not usable because included candidates from A&E/OEMs. Schmidt's work on the new list, however, had a negative impact on the time that he spent calling candidates about the job opening. (Tr. 232–233.)

On April 12, Agnew (inadvertently, at first) initiated an online chat with Schmidt about the low amount of time that Schmidt devoted to calling candidates the previous day. The following exchange occurred during the online chat:

> Agnew: He can [choose] to work hard and be productive. Not the choice yesterday.
>
> Schmidt: Who can [choose] to work hard and be productive? If that is in reference to me because of my call time, I did work hard and [was] productive yesterday. My call plan consisted of only about 16 names because the 50 names I had for Electrical Engineers I could not call because they were at A&E firms. I spent the morning researching a call plan. I could not do that at home because you terminated my [remote] access to CAPS. My time will be better today . . .
>
> Agnew:In the mirror.
>
> Schmidt:I didn't put the blame on anyone else. Just stated the facts. I did what I could to be productive and set myself up to make more calls. I couldn't make the calls I didn't have. I did however probably research 75–100 names. Sorry for the low call time, I will improve it today.

(GC Exh. 20.)

Towards the end of the day on April 12, Agnew emailed Schmidt about his low call time on April 11. Agnew stated as follows in his email:

> Matt:
>
> 40 minutes of call time is too low. I was shocked when I saw this. It was not like you or anyone in the office to have that low of a level of call time and know you have to address this. I had no idea why that was happening and it has taken me a better part of a morning to assess what happened. I am glad you did great research, but you did it during call time. As we have emphasized since you came here, you are to do research during research time, 8:00–8:30; 11:30 to 12:00, 4–5 daily. If you wish to shift from that plan, at a minimum you need to ask me in advance.
>
> Matt, we have over 2000 engineers from utilities in the database and plenty to call. I realize you believe that you "had" to spend call time for research time. That to me does not hold water. Even if there was a miscommunication to you about focusing on utilities, which I do not think there was, you still

> used a vast amount of the day researching when you were to be calling. In the future, let's keep the minimum acceptable level of call time to be about 2 hours per day (3 is a goal), as 40 minutes is unacceptable and I think you would agree with that.

(R. Exh. 26; Tr. 230–232, 471–472.)

P. April 17, 2013—Respondent Terminates Schmidt

On April 16, Schmidt arrived 45 minutes late to work because he overslept. (R. Exh. 50; Tr. 159, 166–168.) Agnew accordingly decided to fire Schmidt, citing Schmidt's: poor performance; attendance record; and poor attitude and damage to the demeanor of the office. (Tr. 466–467.)

On April 17, Agnew emailed Schmidt in the middle of the day with the following message:

> Matt
>
> Yesterday, you "overslept" again. You arrived significantly late and we have brought this pattern to your attention repeatedly. As of this morning, Matt, you have nine unexpected absences since January 2013. Matt, in fairness to you and to the team, this needs to be addressed.

(R. Exh. 29.)

Later in the day, Agnew announced that he would be meeting with each recruiter individually to discuss the jobs they were working on. During Schmidt's meeting with Agnew, Agnew asked Schmidt for a status report on each of the job orders that he was assigned, and then Agnew notified Schmidt that he was terminated, as described below:

> Agnew: Matt, this just isn't working, and I think we need to part ways.
>
> Schmidt:Why?
>
> Agnew:Well, a couple of reasons – your performance, your attendance, and I don't think we can get past what had happened.
>
> Schmidt: I don't understand about my attendance. The days that I've had off, you have supported me on, having off. I was just charged for vacation time. So I don't know where these days off—I don't know why my attendance has been poor.
>
> Agnew:We're not discussing this. You've missed quite a bit of work.
>
> Schmidt:I don't understand how you could terminate me for performance. I was the top recruiter in the office. I just got back from a trip to the Bahamas for being a peak performer in the entire company.
>
> Agnew:You've only made one placement in the past five or six months.

(Tr. 87–90, 309; see also Tr. 484 (noting that Agnew also terminated Schmidt because of his poor attitude).) Agnew then gave Schmidt his final paycheck. Agnew also offered Schmidt an additional check for $10,000 as a severance package, provided that Schmidt sign a five-page document within 24 hours. Schmidt replied that he would review the document and let Agnew know about the severance package, and then left the office. (Tr. 91–93.)

Q. Disparate Treatment Evidence

1. Absenteeism

The evidentiary record shows that Respondent has applied its absenteeism policy (stated in the employee handbook) somewhat informally. There do not appear to be any numerical "triggers" for discipline or discharge due to absenteeism – instead, Respondent generally has charged employees for vacation and sick leave when they arrive late or are out of the office, but has taken more formal steps if employees exhausted their available leave and/or a pattern of repeated absenteeism developed. (Tr. 352–354; see also Tr. 456–457 (noting that Agnew preferred to "invest" in employees until he reached the point where nothing more could be done).) The following table summarizes how Respondent has addressed absenteeism issues in the past few years:

Employee	**Description of Absenteeism**	**Action Taken by Respondent**
R.Fl.	On his first day of work, R.Fl. announced that he would have to leave at 3:00 p.m. (Tr. 458.)	Respondent decided not to retain R.Fl. as an employee. R.Fl. accordingly only worked for Respondent for one day. (Tr. 458–459, 521–522.)
J.J.	In April 2011, Respondent allowed J.J. to use vacation time to take Fridays off. (Tr. 324–325; GC Exh. 16.) In May 2011, J.J. began experiencing health problems that resulted in her being out of the office for 9 consecutive work days, with further absences for medical reasons expected. (GC Exhs. 15–16.)	On June 2, 2011, Respondent informed J.J. that she was terminated or had the option to resign (but would be eligible for rehire). (GC Exh. 17; Tr. 318, 323–331, 458.)
H.M.	In 2008, H.M. had issues with tardiness. (R. Exh. 43.) In January 2009, out of 16 work days, H.M. was absent 5 days, and tardy 2 days. H.M.'s sick and vacation leave were therefore exhausted. (R. Exh. 43.)	In 2008, Respondent authorized H.M. to arrive at work at 8:45 a.m. instead of 8:00 a.m. Respondent also began producing a letter whenever H.M. was tardy or late. (R. Exh. 43.) On January 26, 2009, Respondent

		asked H.M. to sign a letter to indicate that H.M. agreed with Respondent's account of her tardies and absences in 2009. (R. Exh. 43.)
W.M.	In December 2012, W.M. missed 7 days of work, with many of those absences for unspecified reasons. (GC Exh. 18; Tr. 332.)	Respondent concluded that W.M. quit voluntarily. (GC Exh. 18; Tr. 332–333.)

2. Adverse employment action based on poor job performance

As noted above, Respondent began operations in 2007, and has a relatively small number of employees (7 full-time and 7 part-time). As a result, there is limited information about Respondent taking action against employees for poor performance. However, the evidentiary record does show that Agnew was willing to take action to address performance issues when necessary, as set forth below:

Employee	Description of Problem with Performance	Action Taken
E.C.	E.C. was not able to perform the work to Agnew's satisfaction. (Tr. 458.)	On July 1, 2011, E.C. resigned from her job with Respondent. (GC Exh. 22; Tr. 520–521.)
R.Fi.	R.Fi. generated poor sales revenue. (Tr. 317–319, 458.)	Respondent reassigned R.Fi. to a program manager position. Later, R.Fi. voluntarily left the company. (Tr. 321–322, 458, 522.)

3. Performance of employees assigned to the nuclear desk in 2013

In early 2013, Schmidt was the only employee (besides Agnew) who was assigned to the nuclear desk. Employee O.C. joined the nuclear desk in January 2013 (after being hired in October 2012), while D.Da. and David Dulay joined the nuclear desk in March 2013. Since Schmidt by far had the longest tenure on the nuclear desk, it is difficult to compare his performance to O.C., D.Da. and Dulay, who were new to the nuclear desk practice. In any event, nuclear desk employees had the following numbers in 2013 (up to Schmidt's discharge on April 17, 2013):

Employee (date joined the nuclear desk)	Submittals in 2013	Placements (nuclear desk only) in 2013	Amount Billed in 2013
Agnew[29]	No data available in evidentiary record	3 (placements made without assistance of a recruiter or program coordinator)	$101,116.50
O.C. (January 2013)	6	2	$27,325
D.Da. (March 2013)	5	No data available in evidentiary record	No data available in evidentiary record
Dulay (March 2013)	No data available in evidentiary record	0 (on the nuclear desk)	$0 (on the nuclear desk)[30]
Schmidt (April 2011)	27	1	$16,375

(GC Exhs. 13–14 (placements and amounts billed by Agnew, Schmidt and O.C.); GC Exh. 19 (submittals by O.C. and D.Da.); R. Exh. 59 (submittals by Schmidt); R. Exh. 64 (placements and amounts billed by Agnew); see also Tr. 312–313, 426–428, 514–515; FOF, Sections II(B), (H)(2), (M).)

4. Respondent's treatment of employee S.C.

As previously noted, like Schmidt, employee S.C. gave an affidavit and testified in J.L.'s unemployment benefits case. (FOF, Sections II(G), (I).) There is no evidence that Respondent has taken any adverse employment action against S.C. since S.C. gave the affidavit or testified. To the contrary, S.C. was still working for Respondent when this case went to trial, and made more money in 2013 than in 2012. (Tr. 485–486, 525, 530.)

APPLICABLE LEGAL STANDARDS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 12 (2012), enfd. 734 F.3d 764 (8th Cir. 2013); see also *Roosevelt Memorial Medical*

[29] This table does not include placements that Agnew made while working on a different "desk" in the office, nor does it include placements for which Agnew served as the search consultant (and therefore worked with a recruiter or program coordinator who also received credit for the placement). I also note that Agnew's commission as a search consultant differs from the billing rates that apply to recruiters such as Schmidt. (See Tr. 342, 426–428, 514–515.)

[30] Dulay did make one placement in January 2013, that resulted in an amount billed of $26,125, but that placement occurred while Dulay was assigned to another "desk" in the office. (GC Exh. 13; Tr. 312.)

Center, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Relco Locomotives,* 358 NLRB No. 37, slip op. at 12. My credibility findings are set forth above in the findings of fact for this decision.

B. 8(a)(1) Violations

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *Relco Locomotives,* 358 NLRB No. 37, slip op. at 12.

The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. Id. Apart from a few narrow exceptions (none of which apply in this case), an employer's subjective motivation for its conduct or statements is irrelevant to the question of whether those actions violate Section 8(a)(1) of the Act. See *Station Casinos, LLC*, 358 NLRB No. 153, slip op. at 18–19 (2012).

To establish that an adverse employment action violates Section 8(a)(1) of the Act, meanwhile, the General Counsel must demonstrate that: the employee engaged in activity that is "concerted" within the meaning of Section 7 of the Act; the respondent knew of the concerted nature of the employee's activity; the concerted activity was protected by the Act; and the respondent's decision to take adverse action against the employee was motivated by the employee's protected, concerted activity. *Relco Locomotives,* 358 NLRB No. 37, slip op. at 12, 17; see also id. at 14 (observing that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation"). If the General Counsel succeeds in making an initial showing of discrimination, then the respondent has the opportunity to demonstrate, by a preponderance of the evidence, that it would have taken the adverse employment action against the employee even in the absence of the employee's protected concerted activities. Id. at 12; see also *Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 5 (2012).

DISCUSSION AND ANALYSIS

A. Did Respondent Violate the Act by Changing or Limiting Schmidt's Work Assignments and Opportunities?

The General Counsel alleges that from mid-December 2012 to April 2013, Respondent violated the Act by changing, limiting and/or restricting Schmidt's work assignments and work opportunities in retaliation for Schmidt's decision to give an affidavit and testify in J.L.'s unemployment benefits case. In support of this allegation, the General Counsel maintained that Agnew: (a) prohibited Schmidt from having direct contact with nuclear desk clients (except for Constellation Energy); (b) assigned O.C., D.Da. and Dulay to the nuclear desk and assigned them job orders that paid higher commissions and/or were easy to fill; and (c) hid a job order from Schmidt and assigned the order to D.Da.

Applying the standard for assessing whether adverse employment actions violate Section 8(a)(1) of the Act, I find that the General Counsel presented sufficient evidence to make an initial showing of discrimination. Schmidt engaged in protected concerted activity in mid-December 2012 when he and S.C. jointly decided to give affidavits in support of J.L.'s unemployment benefits case, and again on January 29, 2013 when Schmidt and S.C. testified in J.L.'s case.[31] There is also no dispute that Respondent was aware of Schmidt's protected activities, since Respondent received a copy of Schmidt's affidavit on December 19, 2012, and Agnew was present when Schmidt testified on January 29, 2013.[32] (FOF, Section II (G), (I).) As for its initial showing that Respondent acted with animus and discriminatory motivation, the General Counsel presented evidence that the timing of the adverse employment actions was suspicious since the adverse employment actions occurred within weeks of Schmidt's protected activity.

I note that I am not persuaded by other evidence that the General Counsel presented to demonstrate animus. First, I do not find that Agnew engaged in conduct on December 19, 2012, that demonstrated animus. The evidentiary record establishes that after Agnew received Schmidt's and S.C.'s affidavits on December 19, Agnew stormed out of the office. There is no evidence, however, that Agnew directed his outburst at Schmidt. Later in the day, when Agnew and Schmidt spoke about J.L.'s case (after Agnew had acknowledged in an email chat that Schmidt's and S.C.'s affidavits hurt Respondent in the unemployment benefits case against J.L.), Agnew commented that "a couple of things can happen from this: we can let this pull us apart; we can grow from this; or we can part ways." (FOF, Section II(G).) I do not find that comment to be evi-

[31] I do not accept Respondent's argument that Schmidt's decision to testify was not "concerted" activity because the testimony was solely for J.L.'s benefit. (See R. Posttrial Br. at 35.) The evidentiary record shows that S.C. and Schmidt jointly decided to testify at least in part because they wished to deter Respondent from unfairly contesting unemployment benefits claims in future cases that might be brought by Respondent's employees. (FOF Section II(E)(2).) The Board has recognized that collective action of this nature constitutes protected concerted activity. *Supreme Optical Co.*, 235 NLRB 1432, 1432–1433 (1978) (finding that five employees engaged in protected concerted activity when they attended an unemployment benefits hearing to testify in support of a discharged employee), enfd. 628 F.2d 1262 (6th Cir. 1980), cert. denied 451 U.S. 937 (1981)).

[32] Although Schmidt decided in October 2012 that he would participate in J.L.'s case, there is no evidence that Respondent learned of Schmidt's protected activities until December 19, 2012, when Respondent received a copy of Schmidt's affidavit. (FOF, Section II(E)(2), G.)

dence of animus—instead, in context, Agnew's remarks simply expressed the sentiment that while it was a difficult situation for Schmidt and Agnew to be on opposite sides of J.L.'s case, Schmidt and Agnew could choose what course their working relationship would take going forward.

Second, I do not find that Agnew's remarks to Schmidt on February 11, 2013, demonstrate animus. In that conversation, Schmidt was the one who asserted that Agnew was punishing him for testifying in J.L.'s case by assigning "better" job orders to other employees. Through that assertion, Schmidt invited Agnew to engage on the issue, and Agnew obliged by essentially telling Schmidt that J.L.'s case left everyone involved with bruised feelings.[33] (FOF, Section II(J)(2).) Given those facts, the General Counsel did not show that Agnew's February 11 remarks demonstrated discriminatory animus – instead, Agnew's remarks indicate that Agnew was frustrated with Schmidt because he believed Schmidt was focused only on how he (Schmidt) felt after testifying in J.L.'s case, without regard to how the case may have affected others who were involved.

In any event, since the General Counsel made an initial showing of discrimination (albeit a tenuous one), I turn to the question of whether Respondent demonstrated, by a preponderance of the evidence, that it would have made changes to the nuclear desk (and by extension, changes to Schmidt's work assignments and opportunities) even in the absence of Schmidt's protected concerted activities. I find that Respondent carried its burden on this issue. The evidentiary record shows that in October 2012, Agnew was concerned about Schmidt's performance, and was suspicious that Schmidt would leave the company to run a recruiting business with J.L. Agnew also noted that there was some confusion at that time about whether he told Schmidt to limit his direct client contact calls to Constellation Energy. All of those issues, as well as Agnew's belief that he should address the problems by making changes to the nuclear desk, were therefore on the table in October 2012, months before Agnew learned that Schmidt would be a witness in J.L.'s unemployment benefits case. Thus, when Agnew proceeded to make changes to the nuclear desk (by assigning O.C., and later Dulay and D.Da. to work on nuclear desk projects, and by having Schmidt focus his client contact on Constellation Energy), he did not make those changes based on Schmidt's protected activities, but rather made the changes based on concerns that he (Agnew) had about Schmidt before Schmidt engaged in protected activity.[34] Accordingly, I find that Respondent would have changed Schmidt's work assignments and opportunities even in the absence of Schmidt's protected activities, and I recommend that the allegations in paragraphs IV(e)–(f) of the complaint be dismissed.

B. Did Respondent Violate the Act by Instructing Coworkers not to Communicate with or Share Work-Related Information with Schmidt?

The General Counsel also alleges that from mid–December 2012 and April 2013, Respondent unlawfully instructed employees not to communicate with Schmidt, and not to share work-related information with Schmidt. Specifically, the General Counsel contends that Agnew: told Schmidt that he did not need to attend various staff meetings; used a hand gesture to tell Dulay to stop communicating with Schmidt; and generally told Dulay not to talk with Schmidt about Dulay's work assignments.

The General Counsel's arguments fall short because the evidentiary record does not show that Respondent made statements or engaged in conduct that had a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. As a preliminary matter, I do not find that Respondent unreasonably excluded Schmidt from staff meetings. To the contrary, the evidentiary record shows that Respondent included Schmidt (and other employees) in assorted scheduled and impromptu meetings on an as-needed basis, just as Respondent did before Schmidt gave his affidavit and testified in J.L.'s unemployment benefits case. (FOF, Section II(H)(3).)

As for the General Counsel's assertion that Respondent instructed employees not to communicate with or share work-related information with Schmidt, the General Counsel relies on Dulay's testimony, which established that Agnew directed Dulay not to speak with Schmidt about Dulay's work projects. As Dulay explained, Agnew communicated that instruction when Agnew and Dulay met at the office on various occasions, and also when Agnew used a hand gesture (in Schmidt's presence) to signal to Dulay that he should stop talking to Schmidt about a work assignment. (FOF, Section II(M).) That evidence falls short of establishing that Respondent violated Section 8(a)(1) of the Act. Based on Dulay's testimony, Agnew's instruction not to speak to Schmidt was quite narrow, insofar as Agnew only told Dulay to refrain from speaking with Schmidt about Dulay's work projects. Dulay therefore remained free to speak to Schmidt about a variety of other matters, including a wide range of topics that would be protected by the Act (such as working conditions or terms and conditions of employment). The hand gesture that Agnew made to Dulay must be viewed in

[33] Schmidt made a similar assertion on April 10, when Schmidt advised Agnew that he (Schmidt) forgave Agnew for punishing him because Schmidt testified in J.L.'s case. Agnew disregarded Schmidt's remark on that occasion and turned the discussion to another topic (regarding whether Schmidt followed Agnew's instructions when he created a call plan that included candidates from sources that Agnew assigned to another employee). (FOF, Section II(O)(3).)

[34] I also note that the General Counsel did not prove that certain alleged changes actually occurred. For example, although Schmidt claimed that Agnew was giving him work assignments that were lower level or difficult to fill, the evidentiary record does not support that allegation. In fact, when making a round of assignments to O.C. and Schmidt on January 14, 2013, Agnew emphasized that Schmidt's assignments were at a "higher level" to reassure Schmidt that he was not being marginalized on the nuclear desk. (FOF, Section II(H)(2).) Similarly, although Schmidt believed that Agnew "hid" a job order from him by not including it on a list of jobs, the evidentiary record does not show that Agnew intentionally omitted the job order from the list, or that the omission was intended to harm Schmidt. To the contrary, the job order was duly listed in Respondent's computer database (where Schmidt found it), and in any event, there is no evidence that Schmidt was entitled to be informed about job order assignments to other employees (such as this one, which Agnew assigned to D.Da.). (FOF, Section II(M).)

this context – essentially, as a reminder to Dulay that he should not speak to Schmidt about his (Dulay's) work assignments, and not (as the General Counsel alleges) as some larger directive to refrain from communicating to Schmidt altogether. Since Agnew's directives to Dulay regarding speaking to Schmidt were specific, narrow and not related to matters that implicate Section 7 rights, I do not find that Agnew's directives had a reasonable tendency to interfere with, restrain or coerce employees in exercising their rights under the Act,[35] and I recommend that the allegations in paragraphs IV(c)–(d) of the complaint be dismissed.

C. Did Respondent Violate the Act when it Terminated Schmidt?

Finally, the General Counsel alleges that Respondent unlawfully terminated Schmidt for discriminatory reasons on April 17, 2013. The General Counsel's allegation regarding Schmidt's termination is covered by the legal standard that addresses whether an adverse employment action violates Section 8(a)(1) of the Act.

As I noted when analyzing the General Counsel's claims regarding the changes to Schmidt's work assignments and opportunities, the General Counsel presented sufficient evidence to make an initial showing that Respondent terminated Schmidt for discriminatory reasons. Schmidt engaged in protected activity when he participated (along with employee S.C.) in J.L.'s unemployment benefits case, and Respondent was aware of Schmidt's protected activities since it received a copy of Schmidt's affidavit on December 19, 2012, and was present when Schmidt testified on January 29, 2013. Further, the General Counsel made an initial showing of discriminatory animus by presenting evidence that: Agnew gave partly dubious reasons at trial when he tried to explain why Respondent initially decided to remove Schmidt's (and essentially, only Schmidt's) remote access privileges in late March 2013 (see FOF, Section II(O)(2)); and Respondent terminated Schmidt only two-and-a-half months after Schmidt testified (suspicious timing).[36]

I also find, however, that Respondent demonstrated, by a preponderance of the evidence, that it would have terminated Schmidt even in the absence of Schmidt's protected concerted activities. Agnew explained that he decided to terminate Schmidt because of poor performance, poor attendance, and poor attitude. The evidentiary record supports each of those explanations.

On the issue of performance, there is no dispute that Schmidt initially performed quite well as a recruiter, as he made several placements in early and mid–2012 and laid the foundation for earning recognition as a "peak performer." However, Schmidt was not able to sustain such a high level of performance, as his placement numbers declined despite being the primary person on the nuclear desk in fall 2012 when Agnew had to direct some of his attention to the manufacturing desk due to J.L.'s departure from the company. Not surprisingly, Agnew became concerned in fall 2012 (before learning of Schmidt's protected activities) that Schmidt was in a slump, and began contemplating bringing corporate personnel in to work with Schmidt, and assigning other employees to the nuclear desk. (FOF, Section II(C), (D)(3), (F).) Schmidt continued to have mediocre placement results in 2013, such that his production was matched by O.C. (who was brand new to the nuclear desk). (FOF, Section II(Q)(3).)

Turning to Respondent's concerns about Schmidt's attitude, the evidentiary record shows that in early fall 2012 (shortly after J.L. left the company), Agnew formed the impression that Schmidt developed a negative attitude, and that Schmidt's poor attitude was affecting Schmidt's energy level and efforts with teamwork. Schmidt agreed that things were uncomfortable in the office after J.L. departed. (FOF, Section II(D)(3), (F).) In the months that followed, various incidents reinforced Agnew's perception of Schmidt's attitude, including (but not limited to): Schmidt's ongoing problems with absenteeism; offhand remarks that Schmidt made that suggested he was not happy being at the office; and incidents where Schmidt handled candidates and job orders in a manner that made Agnew believe Schmidt was insubordinate and looking out for his own interests. (FOF, Section II(H)(2), (K), (N), (O)(1), (O)(3).)

And, starting in fall 2012, Agnew became concerned about Schmidt's attendance and daily readiness for work, prompting Agnew to raise those concerns in a November 2012 meeting with Schmidt. As he had done with other employees in the past, Agnew initially tolerated Schmidt missing work in 2013 (and simply charged Schmidt vacation time for the hours/days of work that he missed).[37] However, by March 2013, Agnew

[35] I would reach the same result even if I considered Agnew's motive for telling Dulay not to speak to Schmidt about Dulay's work assignments. Agnew credibly explained that he remained concerned that Schmidt would leave the company and join J.L. in running their own recruiting service. Because of that concern, Agnew wished to avoid giving Schmidt information related to recruiting projects that were not assigned to Schmidt. Agnew's motive in instructing Dulay not to talk to Schmidt about work projects was therefore unrelated to Schmidt's protected activities.

In this connection, I note that I am not persuaded by the General Counsel's argument that Respondent did not become concerned about Schmidt joining up with J.L. until after Schmidt gave an affidavit and testified in J.L.'s case. (See G.C. Posttrial Br. at 13–14.) To the contrary, Agnew began taking steps in October 2012 (if not sooner) to address his fear that Schmidt might leave the company to join J.L., months before Schmidt gave his affidavit and testified. (FOF, Section II(F).)

[36] As previously noted, I do not find that Agnew's remarks to Schmidt on December 19, 2012, February 11 and April 10, 2013, demonstrate discriminatory animus. (See Discussion and Analysis, Section A.) I also do not find discriminatory animus based on Agnew's April 17, 2013 statement that he was discharging Schmidt in part because Agnew did not think that they could "get past what had happened." (See FOF, Section II(P).) Agnew's April 17 statement is ambiguous at best, since his reference to "what had happened" could (among other possibilities) refer to the mutual suspicion that developed after J.L. left the company (a lawful rationale for discharging Schmidt), or Schmidt's protected activities (an unlawful rationale). The General Counsel did not present sufficient evidence to resolve this ambiguity in its favor.

[37] For example, Respondent took a similar approach with former employee J.J. Initially, Respondent tried to work with J.J. on attendance issues, as Respondent permitted J.J. to use vacation time to take Fridays off. When J.J.'s absenteeism worsened due to medical prob-

deemed it necessary to remind all employees of Respondent's attendance policy, and also decided to notify Schmidt that he would be placed on a performance improvement plan because of his poor attendance (and poor performance).[38] Despite that warning, Schmidt overslept and arrived late to work on two additional occasions (March 27 and April 16) before Respondent terminated him. (FOF, Section II(F), H(4), (J)(3), (K), (N), (O)(1), (P).)

In sum, Respondent proffered ample support for its decision to terminate Schmidt for poor performance, attitude and attendance,[39] and also demonstrated that it was concerned about those issues before it learned that Schmidt engaged in protected concerted activity. I therefore find that Respondent carried its burden of showing that it would have terminated Schmidt even in the absence of Schmidt's protected activities, and I recommend that the allegation in complaint paragraph IV(g) be dismissed.

CONCLUSION OF LAW

The General Counsel has failed to prove by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

On these findings of fact, conclusion of law and on the entire record, I issue the following recommended[40]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 26, 2014

lems, however, Respondent decided to terminate J.J.'s employment. (FOF, Section II(Q)(1).)

[38] The General Counsel makes much of the fact that on March 1, 2013, Respondent added language to the attendance section of its employee handbook that warned employees that they could be terminated for repeated or excessive absences or tardy arrivals (instead of being placed on a performance improvement plan, which could lead to termination if not completed successfully). I do not see that "policy change" as probative here, since there is no dispute that, consistent with both the original and revised attendance policy, Respondent told Schmidt in mid-March 2013 that he would be placed on a performance improvement plan to address his problems with attendance.

On a related point, I note that I considered the fact that when Respondent placed Schmidt on a performance improvement plan, Respondent did not define Schmidt's expected performance in writing, or have Schmidt agree to those performance expectations. (See FOF Section II(K) (describing the performance improvement plan process).) Respondent's failure to take those steps does not cast doubt on the validity of the performance improvement plan in this case, particularly where there is no dispute that Respondent notified Schmidt (and Schmidt understood) that he needed to improve his attendance. (See FOF Section II(K), (N), (O)(1).)

[39] I note that I considered the disparate treatment evidence in the record, and do not find that any of the former employees that the parties identified were comparable to Schmidt because none of those employees were discharged for a combination of deficiencies that included performance, absenteeism and poor attitude. (See FOF, Section II(Q).) I therefore do not find any evidence that Respondent treated Schmidt more harshly than it treated other employees who engaged in similar misconduct.

[40] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.